



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 634 OF 2009

IN THE MATTER OF THE ESTATE OF M'IRAKU KAIMBA (DECEASED)

STANLEY M'IBIRI M'IRAKU.....1ST PETITIONER

SIMON MWIKATHI M'IRAKU.....2ND PETITIONER

VS

PARIS MWENDA KITHAMBURU.....PROTESTOR

JUDGMENT

[1] **M'ERAKU KAIMBA (“the deceased)** to whom this Succession Cause relates, died on 1st November 1994. The Chief’s letter of introduction dated 11th December 2009 listed the dependants as:

1. Nkongwe M’Mugwika - Daughter
2. Stanley M’Iberi M’Eraku - Son
3. John Kithamburu - Son
4. Lucy Karinthoni - Daughter (Presumed Dead)
5. Simeon Mwikathi M’Iraku - Son

And listed land parcel No. NYAKI/KITHOKA/1693 (hereinafter the ‘**suit land**’) as the only asset of the deceased.

[2] The petitioners petitioned for grant of letters of administration which were issued to them on 4th June 2010. On 28th March 2011 an application to have the letters revoked and annulled were filed by John Kithamburu. As a result, grant of letters of administration intestate were issued jointly to Stanley M’Iberi M’Iraku, Simon Mwikathi M’Iraku and John Kithamburu on 27th June 2011.

[3] The petitioners vide their application dated 18th April 2013 sought for confirmation of the grant made on 4th June 2010 where the sought for the estate to be distributed as follows:

- a) Nkongwe M’Mugwika - ¼ acre
- b) Stanley M’Iberi M’Iraku and Simon Mwikathi M’Iraku to share equally ¾ acre being balance thereof

[4] They filed another application dated 10th January 2014 seeking for the confirmation of the said grant. This was followed by a similar application dated 4th March 2015 where they proposed the estate to be divided equally amongst Nkongwe M’Mugwika, Stanley M’Iberi M’Iraku, Simon Mwikathi M’Iraki and Paris Mwenda Kithamburu.

Protest

[5] A protest was raised by the protestor vide her affidavit sworn on 28th July 2015. He stated that he is the son of the late John Kithamburu.

It was averred that the deceased owned parcel No. NYAKI/KITHOKA 332 which he subdivided during his lifetime into four parcels which he gave his children as follows:

1. Parcel No. 1692 - Stanley M'Iberi Iraku
2. Parcel No. 1693 - John Kithamburu
3. Parcel No. 1694 - Simon Mwikathi M'Iraku
4. Parcel No. 1695 - Nkongwe M'Mugwika registered under the name of her son Silas Kiogora M'Mugwika as per her wishes

But, the parcel given to his father was not officially transferred to him due to his inability to raise the amount needed for official transfer. However, he has been in exclusive use and enjoyment of his portion. Hence it should be given to him as the legal representative of his father's estate.

[6] This protest was opposed vide the replying affidavit of Stanley M'Ibiri M'Iraku sworn on 26th September 2016. He deposed that he has for a long time been utilizing and developed the suit land from the time their parents were alive up till now. Since the applicant's childhood he has never utilized or occupied the portion in question and only surfaced pending confirmation. He affirmed that at no point has John Kithamburu been a holder of the said land parcel. The deceased herein being the sole owner of the said portion he is the immediate beneficiary.

[7] This matter was heard vide *viva voce* evidence. **PW1 Paris Mwenda Kithamburu** reiterated what he had stated earlier and adopted his statement into evidence. He stated that he is the only son to John Kithamburu, son of the deceased. When the deceased subdivided the land each person took their designated portions and everyone sold their portions apart from his father who is buried on the suit land. Transfer was not done to his father because he was in prison at the time. To date he lives of on the suit land which he has developed and cultivated. The 1st petitioner entered the land on 27th April 2016 cut down his trees and erected a small kitchen.

[8] **PW2 Savera Kathure Kithamburu** adopted her statement dated 11th December 2015. She asserted that she was customarily married to John Kithamburu in 1979. By the time John was in prison they had disagreed and parted ways but she left him with their son. She affirmed that the deceased gave his sons their land and title but John was not given as he was in jail.

[9] **PW3 Agnes Kinya Murira** adopted her statement dated 10th December 2015 into evidence. She stated that the deceased and she come from the same village. She affirmed that the deceased's land measures 3 ½ acres. That John lived on the suit land before he was killed in his house which is on the land. Since Paris used to live on the land **PW2** used to come and visit him. She affirmed that Paris comes to the land from his place of work at Maua as he has a house on the land.

[10] Thereafter **DW1 Stanley M'Ibiri** tendered his affidavit sworn on 26th September 2016 in evidence. He told the court that John did not show or introduce Paris to him as his son and that he saw Paris here in court in 2015. For when John died he died without marrying or having any child. The original land of the deceased was 8.42 acres but he sold 5 acres to educate John and NYAKI/KITHOKA/332 measuring 3 ½ acres was the remainder of his land. The deceased gave him and Simon one acre each namely No. 1692 and 1694. He gave Cyrus Kiogora M'Mugwika son of their sister 0.135 Ha. He testified that John beat the deceased and that is the act that got him jailed. He alleged that the deceased died later but of the injuries inflicted upon him by John. He said that he had to sell ½ acre of his part to help the deceased. He then disappeared from John and for safety reasons and so did the rest. He later came back to the one acre because it was their father's land.

[11] This matter was canvassed by way of written submissions. The protestor submitted that the dependants were reasonably and equally provided for by the deceased; to him the distribution satisfied elements of reasonableness and fairness and the court does not need to interfere with the deceased's wishes. He urged that his father was the rightful beneficiary of Parcel No.1693 despite title not being transferred to him. Therefore, the petitioners have no claim. He is a beneficiary of the estate by virtue of **Section 29 of the Act**.

ANALYSIS AND DETERMINATION

[12] The issue of determination is distribution of *the estate of the deceased*.

[13] Before doing so this court must ascertain the identity of the rightful beneficiaries as well as the estate property. It is not in contention that the deceased had three sons and two daughters, namely:-

1. Nkongwe M'Mugwika - Daughter
2. Stanley M'Iberi M'Eraku - Son
3. John Kithamburu - Son
4. Lucy Karinthoni - Daughter (Presumed Dead)
5. Simeon Mwikathi M'Iraku - Son

[14] However, his daughter Lucy Karinthoni was presumed dead on 25th June 2009 in the case of Misc. Succession Cause No. 135A of 2008 and the court also directed that the District Registrar of Birth and Deaths, Imenti North District to issue the 1st petitioner with the death certificate. She left no issues.

[15] The protestor claims that he is the son of John Kithambu son of the deceased. According to the petitioner in their application dated 10th January 2014, John died without any progeny. He supported this stand when he appeared before court. He reiterated this position in court when he testified that he saw the protestor for the first time in court in 2015. This contradicts the documents he tendered in court. In their application dated 4th March 2015 they added the protestor in the mode of distribution. Furthermore, in the 1st petitioner's replying affidavit sworn on 26th September 2016 he stated that John is the protestor's father. The chief's letter from Kithoka location dated 30th June 2016 ascertained that the protestor is the son of John Kithamburu. Witnesses called by the protestor corroborated his claim that he was the son of John. Accordingly, I am find and hold that the protestor is the son of the John Kithamburu. And, therefore, a grandson of the deceased.

[16] John is now deceased. It therefore means that his only child, the protestor will take his share through the principle of representation and section 41 of the Law of Succession Act. This is the only situation when a grandchild takes a share directly from the estate of the deceased. In all other instances, the grandchild must come through **Section 29 of CAP 160** and prove he is a dependant for he was being maintained by the deceased immediately prior to his death. In this case, evidence deduced show that the protestor lived on the suit land with his father. In both instances, the protestor is entitled to his father's share.

[17] But would the claim that his father killed the deceased prohibit his right to inherit? Section 96 below prohibits a person who, while sane, murdered the deceased from sharing in the estate of the person he murdered:-

96. Sane murderer not to share in victim's estate

(1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

(2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder. 97

Sane murderer

[18] But, in this case, it is clear that John was in jail. The petitioner alleged that he was in jail because of assaulting the deceased who died of the injuries inflicted by John. However, evidence of conviction in criminal proceedings of murder of the deceased was not produced as per the law. Parties should endeavour to substantiate serious claims such as this one for it would affect inheritance by such sane murderer. Therefore, nothing turns on the allegation as no evidence was provided by the petitioner; he merely made the claim.

Estate property

[19] The petitioners claimed that the only asset of the deceased is LR. No. NYAKI/KITHOKA/1693. The protestor averred that the said portion was a portion out of NYAKI/KITHOKA/332. That the deceased owned land parcel No. 332 of which he divided into four portions. That he gave the 1st petitioner and 2nd petitioner parcel No. 1692 and 1694 respectively measuring 0.405 Ha. Then gave Silas Kiogora, son of Nkongwe M'mugwika parcel No. 1695 measuring 0.135Ha. This was confirmed by the 1st petitioner. Parcel No. 1693 is still registered under the name of the deceased and I find it is the only estate property.

Gift Inter vivos

[20] However, I should ground the above decision properly. Evidence show that the deceased owned LR. NO. NYAKI/KITHOKA/332. He subdivided it into four portions. He gave the 1st petitioner and 2nd petitioner parcel No. 1692 and 1694 respectively measuring 0.405 Ha. He also gave Silas Kiogora, son of Nkongwe M'mugwika parcel No. 1695 measuring 0.135Ha. And left parcel No 1693 in his name. The parcels he gave to his two sons and son of his daughter are gifts inter vivos and such is not estate property except it shall be taken into account in determining their ultimate entitlement in the estate under section 28 and 42 of the Law of Succession. Section 42 is produced below:-

42. Previous benefits to be brought into account

Where

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house

Distribution

[21] According to the protestor, only his father John was not given a share. He stated that the remaining portion was for his father and he has been occupying. According to him, it was not transferred to his father's name because he had no money to cater for the transfer as he was in prison. The reason may not be true and other matters may have been responsible for the deceased's failure to transfer the land to John. But, that aside, when I take into account the portions given to the three children of the deceased, they are sufficient inheritance given the size of the estate property. Accordingly, John is the only person who shall partake of the estate.

[22] I have stated time without number that section 42 of the Law of Succession Act restrains greed and double-portion to dependants. It also acts as a stabilizer and enabler of equity and equality amongst dependants enshrined in **Section 38 of CAP 160** which states:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

[23] The petitioners' had already been gifted their share by the deceased which they sold thus they cannot come to prey on the remaining land and evict the protestor from the estate which is apparently John Kithamburu's portion. I award the protestor the estate property wholly.

[24] The grant to be confirmed is the one that was issued on 27th June 2011 to Stanley M'Iberi M'Iraku, Simon Mwikathi M'Iraku and John Kithamburu. John is deceased and given the circumstances of the case I appoint PARIS MWENDA KITHAMBURU as joint administrator. A grant in their three names shall be issued immediately.

[25] From the foregoing, I make the following orders:

- (a) The grant of letters of administration intestate issued on 27th June 2011 and as amended herein are hereby confirmed.
- (b) The estate of the deceased No. NYAKI/KITHOKA/1693 shall be distributed solely to PARIS MWENDA KITHAMBURU.
- (c) Should the other administrators fail to sign conveyance and transmission documents, the Executive officer of the court shall sign all the relevant papers. I am aware the acrimony among the parties herein. It is so ordered.

Dated, signed and delivered in open court at Meru this 20th day of December, 2018

F. GIKONYO

JUDGE

In presence of-;

Ngunjiri for protestor

Otieno c for petitioner

F. GIKONYO

JUDGE